

NOT FOR PUBLICATION

JAN 24 2008

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID PHILLIPS,

Plaintiff - Appellant,

v.

RICHARD BOWLES; et al.,

Defendants - Appellees.

No. 06-17235

D.C. No. CV-06-02549-SI

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Submitted January 14, 2008**

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

David Phillips, an attorney, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging civil rights violations arising out of an action he brought in state court. We have jurisdiction under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1291. We review de novo a district court’s jurisdictional dismissal based on the *Rooker-Feldman* doctrine. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003). We affirm in part and reverse in part.

The district court properly concluded that the *Rooker-Feldman* doctrine barred Phillips’s action as to the non-judicial defendants because it is a “forbidden de facto appeal” of state court proceedings, and raises constitutional claims that are “inextricably intertwined” with those prior state court decisions. *Id.* at 1158.

The district court should also have relied on the *Rooker-Feldman* doctrine, rather than judicial immunity, to dismiss the claims against the judicial defendants. *See Elwood v. Drescher*, 456 F.3d 943, 948 (9th Cir. 2006) (“federal courts must generally address jurisdictional issues first”); *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 607 n.4 (9th Cir. 2005) (explaining that where “the subject matter jurisdiction inquiry involves a straightforward application of the *Rooker-Feldman* doctrine,” the court would “rely[] upon the lack of subject matter jurisdiction to dismiss” the various sets of defendants). Accordingly, the award of attorneys’ fees to the judicial defendants must be reversed. *See Elwood*, 456 F.3d at 948 (vacating award of attorneys’ fees to judicial defendants where claims had been dismissed on judicial immunity, and in the alternative, *Rooker-Feldman*, grounds, because “[w]here a claim is dismissed for lack of subject matter

jurisdiction, the defendant is not a prevailing party within the meaning of § 1988, and the district court accordingly lacks jurisdiction to award attorneys' fees.”).

The parties shall bear their own costs on appeal.¹

AFFIRMED in part; REVERSED in part.

¹ We deny without prejudice Appellees' request for sanctions under Fed. R. App. P. 38 because they have failed to file a separate motion. *See Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 709 (9th Cir. 2004) (denying the motion for attorneys' fees without prejudice because “[a] request [for an award of fees] made in an appellate brief does not satisfy Rule 38.”) (internal quotations omitted).